RECENT AMERICAN DECISIONS.

In the Supreme Court of Michigan.

THE PEOPLE *vs.* COLLINS.

1. The power of enacting general laws cannot be delegated by the legislative body even to the people from whom all govermental powers originally emanated. Per DOUGLASS, J., all the judges *assenting.*
2. Sections 18, 19 and 20 of the "act prohibiting the manufacture of intoxicating beverages and the traffic therein" approved Feb. 11, 1853, are void, because an attempted delegation of legislative power to the poople. Per WING, PRATT, DOUGLASS and COPELAND, JJ.
3. Powers of local legislation or rather powers of administrative legislation are not within the principle, and may be delegated; neither are enactments in the nature of *propositions* where mere acceptance calls the law in force.

This case came into the Supreme Court on a reservation by the Presiding Judge of Wayne Circuit Court of the question whether "an act prohibiting the manufacture of intoxicating beverages and the traffic therein" approved Feb. 11, 1853, was constitutionally in force.

On the question the court were equally divided.

GREEN, C. J. and WHIPPLE, MARTIN and JOHNSON, Justices, held the affirmative.

WING, PRATT, DOUGLASS and COPELAD, Justices, held the negative.

PRATT, J. delivered a writen opinion in which he reviewed the authorities at great length, but all the judges holding the negative concurred in the following opinion, delivered by

DOUGLASS, J.—This is an action of debt to recover the penalty for selling ardent spirits, prescribed by "an act prohibiting the manufacture of intoxicating beverages and the traffic therein," approved February 11, 1853. (L. 1853, p. 100.) The offence is alleged to have been committed on the 19th day of December last; and the question presented is, whether at this time those provisions of the act which prescribe the penalty and the mode of recovering it, were in force.

The 18th, 19th and 20th sections of the act provided that a vote of the electors of the State should be taken at the time and in the manner prescribed, and that in case a majority of the votes cast at such election should be in favor of its adoption, the "act should become a law of this State from and after Dec. 1, 1853" if against its adoption, it "should take effect and become a law of this State from and after March 1, 1870." An election was held in June last in pursuance of these sections, and resulted in a majority in favor of the adoption of the law. If the act is in force (except the sections mentioned) it took effect as a law, in virtue of this popular vote, on the 1st of December last.

We are of the opinion that it never has been constitutionally put in force.

In establishing a government the will of the people is sovereign. They may organize such government, invest it with such powers, confer those powers upon such agents, or reserve them to themselves as they may deem most conducive to their own welfare. But when they have adopted a written constitution of government, all, collectively as well as individually, are bound by it. The various powers of the government must be exercised by those in whom the constitution vests them or contemplates they may be vested. No act of the government can emanate from any other source, not even from the people themselves. The people have such control over its action through the right of suffrage, or otherwise, and such right to participate in the exercise of its sovereign powers as they reserved to themselves, and no other.

The constitution of 1851 vests the legislative power in this State, in a Senate and House of Representatives. Art. 4, Sec. 1. This article confers the entire supreme legislative power upon these two bodies, except in a single instance. Art. 15, Sec. 2, declares that no banking law shall have effect until approved by a majority of the electors of the State. In this instance, the people have reserved legislative power to themselves. All other legislative power in this State must be exercised by the Legislature, or by those to whom they have constitutionally delegated it.

The Legislature may delegate this power in those cases where the

constitution authorizes and contemplates it, *and in no others.* All our American constitutions, State and Federal, contemplate or expressly provide for local self government. They go upon the principle of leaving matters of purely local concern to the control of those directly interested. Counties, townships, cities and villages, with powers of local legislation, have always existed among us. Our forefathers brought with them from the mother country these municipal institutions, which have performed so important a part in the development of modern civil liberty, by preventing the centralization of power. Their existence, in perhaps every State, has preceded the adoption of written constitutions. All those constitutions assume their existence and contemplate that they will continue to exist, and may fairly be held to imply that the ordinary powers of legislation with which they have always been vested may, as occasion shall require, be conferred upon them.

Our own constitution provides that Counties and Townships shall be bodies corporate, *with such powers and immunities as shall be prescribed by law.* Art. 10, Sec. 1; Art. 11, Sec. 2. and Art. 4, Sec. 38, declare what is clearly to be inferred from numerous other provisions, that the Legislature may confer upon organized Townships, incorporated Cities and Villages, and upon the boards of supervisors of the several Counties such powers of a *local legislative* and administrative character as they may deem proper. Powers of local legislation, then, may be delegated to these municipal bodies because it is authorized, and as we conceive for no other reason. And in the case of Townships, Cities and Villages, the fundamental law being silent on the subject, these powers may be vested in the people of these bodies or in persons chosen by the people. This is a matter in the discretion of the Legislature. Whether in any case they can be vested in the people of a County instead of the board of supervisors, in this State, it is unnecessary to determine. Probably they may; certainly so in those States whose constitutions designate no persons within the County upon whom such powers are to be conferred.

But even in the cases referred to, only powers of legislation over matters of local concern can be delegated. If the Legislature should

attempt to invest the boards of supervisors with power to enact the *entire* civil and criminal codes which should be in force within their respective Counties, this would manifestly be in violation of the true intent and spirit of the constitution. *Rice* vs. *Foster*, 4 Harr. Del. R. 477; *Parker* vs. *Commonwealth*, 6 Barr, 509. But see also *Bancroft* vs. *Dumas*, 21 Verm. R. 555.

That the Legislature may confer upon others in their discretion *administrative* powers necessary or proper for carrying on the government, not otherwise vested by the constitution, and in some cases involving the exercise of a discretion which the Legislature itself might but could not conveniently have exercised, no one will question. These, however, are not law-making powers, and therefore do not here require particular notice.

But the power of enacting general laws cannot be delegated,—not even to the people. There is nothing in the constitution which authorizes or contemplates it; nothing in the nature of the power which requires it; nothing in the usages of our American Governments which sanctions it; no single adjudication of a court of last resort in any State which affirms it; and such delegation would be contrary to the intent manifested by the very structure of the legislative department of the government.

While the power and the responsibility of Legislation remain where the constitution has placed them, before any proposed measure can become a law, it must first struggle for ascendency at the ballot box amid the numerous issues involved in allpolitical contests. It must pass through the ordeal of public and deliberate discussions in the Legislature. It must receive the sanction of the concurrent votes of a majority, or, having been returned with the Governor's veto, of two-thirds of the members of the two Houses of which the Legislature is composed,—votes cast by men who are not the mere deputies of their immediate constituents, but the representatives of the whole people and bound to act for the general good—who are responsible to the people for their action and may be held to that responsibility. Public opinion will prevail and pass into public law, but it will be *enlightened, deliberate, permanent* and *organically expressed public opinion.* It is this opinion alone which

the constitution designed should govern. Such a government secures deliberation and responsibility in Legislation, and affords protection against the despotism of official rulers on the one hand, and of irresponsible numerical majorities on the other. It has been appropriately termed the "flower of modern civilization."

But if the Legislature may transfer this power and this responsibility to the people, where are the checks which the constitution intended to provide against hasty and inconsiderate legislation? Where are the securities against arbitrary and irresponsible power? We may be subjected to the dominion of the popular majority of the hour—a majority whose opinion *must* be formed without legislative discussion or deliberation—a majority responsible to one because it has no superior—impatient of restraint, because conscious of its strength and apt to think itself infallible, and against whose resistless will thus exercised directly on matters of legislation, with an elective judiciary, all the restraints which the constitution has imposed upon legislative power, will, in the end, prove utterly unavailing.

In short, if this power may be delegated to the people, then, by the action of one of its departments, this *representative* goverment may be transformed into a collective *democracy*—the only such democracy practicable where the people are too numerous to assemble *en masse*—namely: a democracy in which a select body propose the laws, and the people adopt or reject them. No such revolution can be effected in the nature of this government without either a change or a violation of the constitution.

The Legislature, then, connot delegate power of legislation in reference to general laws. On this point, it is believed that the members of this court are all agreed. We are not aware that any jurist in this country has ever expressed a different opinion.

Nobody makes a question that the act of Feb. 12, 1853, is a general law.

If so, it is clear that it is not now the law of this State, unless made so by the legislature, in whom the power of legislation in refe- to general laws is exclusively vested.

We are of the opinion that, although it may be a valid act to take effect in 1870, the legislature have never yet put it in force; and

that sections 18, 19 and 20, and the popular vote under them, are void, because an attempted delegation to, and exercise of legislative power by the people in violation of the Constitution.

As one-half the members of this Court do not concur in this opinion, we must be pardoned if, in order to make our views more clearly understood, we recur to principles and definitions somewhat elementary in their nature.

All power proceeds from, and its exercise implies the exertion of, *intelligent will*. Its different kinds are distinguished by the nature of the end which this *will* is exerted to accomplish, and of the *discretion* which its exertion implies. Legislative power is the power of *prescribing* rules of civil conduct, or, in other words, of *enacting* laws. Its possession imposes the duty of judging what laws are expedient, and what are inexpedient. Its exercise consists in the expression of will as to what laws shall be in force, founded upon this judgment. "A statute," says Chancellor Kent, "is the express written *will* of the legislature, rendered authentic by certain prescribed forms and solemnities." 1 Kent Com. 447. Its enactment always implies the judgment of the legislature that it is expedient. There certainly can be no statute law which is not the will of the law makers, implying this judgment as to its expediency. And every expression of this will, implying this judgment, which is the proximate cause of an obligatory rule of civil conduct, is clearly an exercise of legislative power.

Now, when the legislature make the taking effect of an act depend upon the approval or disapproval of others, what is the nature and effect of their action? They do not themselves *will* that the act shall become a law, but merely that it shall be referred to the will of others to determine whether it shall become a law or not. Their action does not imply their judgment that the law would be expedient, but merely that it is expedient to refer the question of the expediency of the law to the judgment of others. They do not, therefore, exercise the power and the discretion necessary to enact the law, or, in other words, to make it an operative rule of conduct, but they confer upon others identically the same power, and impose the duty of exercising the same discretion which they themselves

would have exercised if they had enacted it. They merely propose a law to be adopted or rejected by others.

This seems to us most clearly a delegation of legislative power.

Probably no doubts would ever have arisen on this subject, were it not for the indirect manner in which the delegation is made. But there is obviously no difference in principle between making the taking effect of an act depend upon the approval or disapproval of others, and conferring in express terms the power of legislating on the same subject. The only difference there can be is in the extent, not in the nature of the power delegated. Thus, if the Legislature should pass an act prescribing the manner in which the streets of Detroit should be paved, and make its taking effect depend upon the approval of the Common Council, this mode of legislation would confer upon the Common Council power of the same nature as that which would be conferred by an act authorizing them to prescribe the mode of paving streets. The only difference in the two cases is that, in the former, the power of the Common Council is limited to the adoption or rejection of a law proposed to them; in the latter, they are at liberty to adopt whatever law they choose on the same subject. Again, by the common law, which prevails in most of the States, the owner of cattle running at large is liable for any damage which they may occasion to others; but it is sometimes expedient that a different rule should prevail in particular townships, owing to peculiar circumstances. Suppose, this being a general law, the Legislature should pass an act declaring that cattle might run at large in a particular township, without such liability of the owners, to take effect on a vote of the people of the township in its favor. Such a law would confer upon the people, substantially the same power as a law authorizing them to enact a by-law to the same effect. And most clearly the latter would delegate power of local legislation.

Legislative power may be conferred upon small bodies, like the Common Council of a city, or the people of a township, in either of the modes referred to; but it is obvious that the only practicable mode of delegating it to the people of a county, or of the whole State, is by legislative acts, to take effect upon their approval. For

the people, either of a county or State, are too numerous and too widely dispersed to assemble *en masse*, and act as a legislative body. They can only exercise legislative power, by adopting or rejecting laws proposed by the Legislature, who alone can invest them with the forms and solemnities by which laws must be authenticated. It is for this reason, that the people reserved to themselves legislative power, in reference to banking laws, in the only way they could reserve it, when they provided in the constitution that no such law should *have effect*, until approved by a majority of the electors of this State.

We are now prepared to examine the act under consideration. No one will contend that it is the law of this State, except so far as it expresses the *will* of the Legislature, and is not in conflict with the constitution.

But it does not express their will that any of its provisions, except sections 18, 19 and 20, should take effect before 1870; nor does its enactment imply their judgment as to the expediency of its taking effect at an earlier period. It might have passed the Legislature in its present form, although every member thought it inexpedient that it should become a law. The sections mentioned provide for taking a vote of the people upon the question, whether or not the act should take effect at an earlier period, namely, on the 2d of December, 1853, and declare that it should then become a law, if a majority of the votes cast should be in favor of it. The vote of the people expressed their will and their judgment, that it was expedient that it should become the law of this State on the day last mentioned.

If the act (except the sections mentioned) is now in force, who exerted the power which put it in force? Certainly not the Legislature. They merely clothed it with the forms and solemnities, by which laws must be authenticated, and conferred upon the people the power to put it in force in December, 1853. Without the exercise of this power by the people or some further act of the Legislature, it must have remained without vitality until 1870. Clearly, it is the will of the people, expressed by their votes in June, which has put it in force. And that will was directed to the same end,

implied the exercise of the same discretion, and was therefore of the same nature as the will which the Legislature would have exercised, if instead of sections 18, 19 and 20, they had enacted these words: "This act shall become a law from and after December 1st, 1853." This was legislative will. The power of putting a law in force by its exercise was legislative power. The sections of the act which purported to confer it, if valid, delegated legislative power to the people, in the only way in which, as we have already shown, it was practicable to delegate it. And the act, if in force, is so only in virtue of the exercise of this delegated power.

It seems to have been supposed by some that the constitutional objection which might exist, to a submission of the question, whether the act should take effect at all, might be evaded by submitting the question, whether it should take effect at one or the other of two periods of time, separated from each other by an interval of seventeen years. But there is obviously no difference in principle between the two cases. The determination of the latter question would just as clearly be an act of legislation, as the determination of the former. We do not understand the counsel for the people to insist, or any member of this court to be of the opinion that there is any distinction between them. Indeed, the former was the real and substantial question submitted by the act of 1853. No great respect is due to the sophistry, which dictated the form of it, and which assumes that a constitutional objection to an unqualified submission might be evaded by submitting the question, whether an act should become a law presently or in the next generation. Obviously the same result would be accomplished by the one mode of legislation as by the other. It is the thing done, and not the mode of doing it, which is material. A constitution which could be evaded by such a subterfuge would scarcely be worth the paper on which it is written.

The conclusions at which we have arrived, namely, first, that the power of legislation in reference to general laws is vested exclusively in the Legislature and cannot be delegated; and secondly, that the taking effect of such laws cannot be made to depend upon the result of a popular vote upon the question, whether or when they shall

take effect, because this would be a delegation of such power; from which it necessarily results that the act in question has never yet been constitutionally put in force, are fully sustained by the decision of the Supreme Court of Delaware in *Rice* vs. *Foster*, (4, Harr. Del. R. 477,) of the Supreme Court of Pennsylvania in *Parker* vs. *the Commonwealth*, (6. Barr, 509,) decisions of different Supreme Courts in New York, only one of which, *Bradley* vs. *Baxter*, (Am. Law Reg. Sep. 1853) is yet reported and finally by the unanimous decision of the Court of Appeals of that State in *Barto* vs. *Himrod*, decided in July, 1853. The New York cases all involved the question of the validity of the School Law of that State, which was submitted to the people for adoption or rejection, and no attempt has been made to distinguish them from the case before us. The same views were expressed by Stuart, J. in delivering the opinion of the Supreme Court of Indiana in *Maize* vs. *the State*, decided in November last, but they were not necessary to the determination of the case then before the Court. Such weight of authority against the validity of a species of legislation which all know is of recent origin, could scarcely be expected, and if the case before us was far less clear upon principle than it is to our minds, we should hesitate long before we ventured to dissent from the views of the eminent jurists who have preceded us in the consideration of this subject.

There is but one contrary decision, and that is in the case of *Johnson* vs. *Rich*, (9 Barb. S. C. R. 680) decided by the Supreme Court of New York, for the 7th District, three judges being present, and one dissenting; and the case has been overruled by the Court of Appeals, in *Barto* vs. *Himrod* already referred to.

In the *People* vs. *Reynolds* (1 Gilm. 1) the *Commonwealth* vs. *Quarter Session* (8 Barr. 391) and the *Commonwealth* vs. *Painter* (10 *id.* 214) laws special and local in their nature, which were made to take effect upon the vote of the people of the counties or townships interested, were held valid. Perhaps these cases were all correctly decided upon the principle we have already explained at some length, that powers of local legislation may be delegated. We concede, however, that the Courts by whom they were respectively decided, do not place them distinctly upon this ground, but rather

upon the ground that the power conferred in each case was administrative and not legislative in its nature. Whatever explanation may be given to them, one thing is certain, they expressly concede that general laws cannot be made to take effect upon the result of a popular vote. This concession is distinctly made in the *People* vs. *Reynolds*, and the two remaining cases were decided by the same court which had previously decided *Parker* vs. *the Commonwealth*, with the express avowal that it was not the intention to overrule it.

Not only are the conclusions at which we have arrived, in accordance with the almost unbroken current of authority, but they are consistent with all the established usages of legislation. We are not aware that in a single instance a general statute has been acquiesced in as valid, which was made to take effect upon the exercise by others of the same will and discretion the Legislature would have exercised if they had made its taking effect unconditional, and which consequently in our view delegated legislative power. Most, if not all, of the instances of this kind of legislation to which we have been referred were laws relating to matters of local concern, made to take effect upon a vote of the people of a township or county in their favor, and in our view valid not because legislative power was not delegated, but because, in those cases, the Legislature had authority to delegate it. Many other instances referred to were laws which, as they came from the hands of the Legislature, were valid enactments in the nature of *propositions*, and the popular vote was a mere acceptance of the terms proposed (like the acceptance of an act creating a private corporation), and therefore not an exercise of legislative power at all. Such was the vote of the convention upon which the admission of this State into the Union, was made to depend by the act of Congress of June 15, 1836. An attempt to refer to the various laws cited would lead to great prolixity. There is one instance, however, of what may be termed general legislation, which requires notice. It has been urged that upon the principles we maintain, the Constitution of 1851, has never been adopted; for the Convention which framed it, submitted it to the people to determine whether it should take effect or not. If the

Convention had power to enact the Constitution at all without submitting it to the people, *which may well be doubted*, we are clearly of the opinion that they were authorized to delegate this power to the people, and most unquestionably they did so by the submission, for certainly it was the people who made it the fundamental law. There was nothing in the Constitution of 1836, or in the nature and objects of the Convention, inconsistent with such a submission. That constitution merely provided for the calling of a Convention when two-thirds of each branch of the Legislature should think a revision necessary, and a majority of the people voted in favor of it, but did not prescribe the powers or duties of the Convention when called. It did not provide that *the power of revision should be vested in the Convention* (Art. 12, § 2). And as constitutions are always in theory the direct expression of the will of the people, and in nearly every instance in this country have been adopted by them, there can be no doubt that the submission of the present Constitution to the people was in entire accordance with the true intent of the Constitution which it superseded.

Those of our brethren who are of the opinion that the law in question is now in force, concur in the views expressed by the court in the overruled case of *Johnson* vs. *Rich*, before cited. They hold that an act may be made to take effect upon the happening of any future event, certain or contingent; that when such an act takes effect it does so in virtue solely of the will of the legislature which prescribes the event and its *power*, and therefore no legislative power is delegated. And they are of the opinion that this was a valid statute to take effect upon the happening of a future contingent event: namely; the result of a popular vote.

Unquestionably, no legislative power is conferred by an act, the taking effect of which is made to depend upon the happening of some future event which is a mere change of circumstances upon which the expediency of the law in the judgment of the law-makers depends, such as a change of the seasons, or a hostile invasion. For, in such a case, most clearly the will of the Legislature puts the law in force. No other will is exerted to that end. The event is the mere *occasion*, not the *cause* of its coming into effect. The

Legislature do not refer it to others to determine whether it shall become a law or not. And on the question of the expediency of the law they exercise their own judgment definitely and finally. They do not appeal to others to judge for them as to its present or future expediency.—They exercise the will and the discretion which, in the case of general laws the constitution makes it their duty to exercise. No legislative power is conferred by those provisions of the act which prescribe the event, and make it the occasion of the taking effect of the law (it is absurd, to speak of prescribing the *power* of such an event,) *because* the event implies no exertion of *intelligent will in determining whether it shall take effect or not.*

But where the taking effect of an act is made to depend upon a future event which, like the popular vote in this case, is a mere exercise and expression of the same will and the same judgment as to the expediency of the law, which the Legislature would have exercised if they had enacted that the law should take effect unconditionally at the time specified, how can it be said that the law comes into force in virtue of the will and the judgment of the Legislature? The event itself is an exercise of the will of the people, which determines the very question whether the law shall take effect or not. How can it be said that the Legislature determine it? We trust we have already shown that it is the will of the people, and not of the Legislature which makes the act a law; that the people and not the Legislature decide as to its expediency; and that *because* the event itself is a mere exercise of legislative will and discretion, those provisions of the act which, "prescribe the event and its *power*," delegate legislative power.

That reasoning which overlooks the wide distinction between the making an act to take effect upon the happening of an event which is, and one which is not a mere exercise of legislative will and discretion, and infers that because legislative power is not delegated in the one case, it is not in the other, is surely fallacious.

Unquestionably it is true that the Legislature may enact a valid law to take effect upon the happening of any future event certain or contingent, which does not involve the exercise by others of that legislative will and discretion which they cannnot constitutionally

delegate to them the power of exercising. Thus far the doctrine that laws may be made to take effect upon future events extends, and no farther.

Finally, if it is true, *as all concede*, that power of legislation in reference to general laws cannot be delegated to the people, *because*, if this were so, by the action of one of its departments, this *representative* government might be transformed into a *democracy* in which the Legislature merely propose the laws and the people adopt or reject them, then is it not clear that the act in question is not constitutionally in force? For call it a law to take effect upon a contingency, or a law delegating legislative power,—call it what we will, this is certain, that in substance and effect it was merely proposed by the Legislature, and, if their vote had any validity, adopted by the people.

Mississippi Court of Appeals. October Term, 1853.

JAMES M. LYON *vs.* JOHN KNOTT ET UX.[1]

1. *Mississippi Act of* 1839. *Marital rights. Statutory limitations.*—The statute of Mississippi of 1839, which secures to a married woman certain property in her own right, is a limitation of the marital rights of the husband, as they existed at common law, but does not restrict such rights beyond the express and positive language of the act, or by necessary implication therefrom.

2. *Marital rights. Succession or distribution.*—The future right of the husband to the property is a right incident to the contract of marriage, as regulated by law; the husband does not succeed to the slaves of the wife, held by her under the statute, as an inheritor or distributee of her separate estate, but they *vest* in him under the law, and by virtue of the contract of marriage.

3. *Remainders, Vested — Contingent.* — The uncertainty whether a remainder will ever take effect in possession, will not prevent it from being a vested remainder, provided the interest be fixed. It is the present capacity of taking effect in possession, if the possession were to become vacant, which distinguishes a vested from a contingent remainder. Therefore, though children may be born of the marriage, or the wife may survive the husband, yet the right of the husband to the slaves of the wife, under the statute, is vested by the marriage, as he is from

[1] Reported by Mr. Attorney General GLENN.